IN THE

# Supreme Court of the United States

OCTOBER TERM 1980

No. 80-163

IN RE

CHESTNUTT MANAGEMENT CORPORATION,

*Petitioner,*

—v.—

HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, Circuit Judges, and the HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

*Respondents,*

—and—

ELEANOR C. MILLER,

*Respondent.*

## PETITIONER'S REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND WRIT OF MANDAMUS

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Dated: September 9, 1980

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## PETITIONER'S REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND WRIT OF MANDAMUS

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### Introduction

Respondent Miller* has not found authority in the near two centuries of this Court for survival of a general verdict upon a non-existent federal claim.

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* Brief of the Respondent, Eleanor C. Miller, in Opposition to Motion For Leave To File Petition For Writ of Mandamus,

Nor has she found authority to resurrect the nonfederal ground adjudicated against her when this Court determined its jurisdiction and exercised its power.

Nor has she even identified any case, jury or nonjury, where a purported non-federal ground has been held to have survived this Court's exercise of jurisdiction and judgment, *sub silentio*.

## I.

### Respondent Judges Have Defeated This Court's Appellate Jurisdiction.

Respondent Miller treats this case as if it *never purported* to involve a federal question—a case that was pleaded, tried, charged to the jury and affirmed on appeal as a general jury verdict for punitive damage for publication of unorthodox ideas in violation of the Investment Advisers Act (15 U.S.C. §80b, *et seq.*), *i.e.*, heresy.

So to treat this case as if it never transpired on federal ground cannot excuse Respondent Miller's failure to cite, or responsibly to discuss, *New York and New Jersey Sandy Hook Pilot's Association* v. *Halecki*, 358 U.S. 613 (1959), where a general verdict could not stand since there was:

> ". . . no way to know that the invalid claim of unseaworthiness was not the *sole* basis for the verdict." (358 U.S. at 619, emphasis added).

(Discussed, Pet. for Mandamus, pp. 22-23)

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Petition For Writ of Mandamus And Brief In Support Thereof (Herein, "Miller Op. to Mandamus"), received by petitioner September 2, 1980.

Respondents Judge Timbers, *et al.* have advised the Clerk by letter dated August 22, 1980 that they will file no opposition unless requested by this Court.

Nor does she attempt to discuss, or even cite, *Sunkist Growers, Inc.* v. *Winkler & Smith, etc.*, 370 U.S. 19 (1962) at 29-30 quoted (Pet. for Mandamus, p. 2) in our "Questions Presented" to show that Respondent Judges had compounded error to defeat this Court's appellate jurisdiction.

In the face of *Halecki, supra,* and *Sunkist Growers, Inc., supra,* it is not surprising that Respondent Miller chooses not to discuss them. Instead of attempting to present legal analysis how this Court's *closing* the door on a general jury verdict upon a non-existent federal claim may nevertheless be obviated through common law recycling to accomplish a retroactive cure, Respondent Miller relies upon a case where this Court *opened* a wide constitutional door. (Miller Op. to Mandamus, p. 7)

In *W.M.C.A.* v. *Simon,* 370 U.S. 90 (1962) where the complaint had been dismissed on its face, this Court stated (at 191):

> "On March 26, 1962, we held in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, that a justiciable federal constitutional cause of action is stated by a claim of arbitrary impairment of votes by means of invidiously discriminatory geographic classification. Our well-established practice of a remand for consideration in the light of a subsequent decision therefore applies. As in Scholle v. Hare, 369 U.S. 429, 82 S.Ct. 910, we believe *that the court below should be the first to consider the merits of the federal constitutional claim,* free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination. The judgment is vacated and the case is remanded for further consideration in the light of Baker v. Carr, supra." (Emphasis added).

Here, by contrast, the trial court, the jury general verdict, and the Court of Appeals had already been "first to consider" the very ground which this Court's mandate herein held to be a non-existent federal claim for money damage under the Advisers Act.

Likewise, when this Court *opened* the door under a federal statute in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), the remand in *National Society of Professional Engineers* v. *United States,* 422 U.S. 1031 (1975) was to determine whether the government could pass through the very door thus opened. See 435 U.S. 679 (1978). (Miller Op. to Mandamus, p. 9.)

Where at least *four* sections of two federal securities statutes, with their particularized standards and separate burdens of proof were involved, this Court remanded in *John Nuveen & Co., Inc.* v. *Sanders,* 425 U.S. 929 (1976), for reconsideration in light of *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976), which interpreted only *one* of those *four* statutory provisions. (Miller Op. to Mandamus, p. 10-11.)

In *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), the claim for attorneys' fees was "not directly in issue in the original proceedings. . . It was neither before the Circuit Court of Appeals nor before this Court." (at 168). Therefore, it was not "laid at rest" by the prior mandate. (Miller op. to Mandamus, p. 10, 11.)

The purported common law claim was before the jury, both courts below and was presented to this Court as a jurisdictional bar. (See Pet. Mandamus, paragraphs "(4)" and "(5)", page 13.)

Respondent (Miller Op. to Mandamus, pp. 9, 10) misapprehends deference to the highest State Court, citing *Henry* v. *City of Rock Hill,* 375 U.S. 6 (1963) and 376 U.S.

776 (1964). That remand to consider *whether* an adequate state ground existed consistent with the Constitution differs utterly from this Court's adjudication herein that no adequate nonfederal ground existed to bar this Court's reaching and deciding the federal statutory question.

Just as Respondent Miller has not identified any case, whether reasoned precedent or possible judicial accident, which permitted a nonfederal ground to survive this Court's judgment, *sub silentio*; so likewise, she may not be heard to contend that this Court's tread is too airy to touch upon nonfederal ground through which it must march to reach the territory of a federal statute.

Respondent Miller assails summary disposition of this case. See *Hicks* v. *Miranda,* 422 U.S. 322 (1976). Respondent Judges traverse summary disposition. In *Wolf* v. *Weinstein,* 372 U.S. 633 (1963) this Court decided one statutory question on the merits, and simultaneously dismissed the writ as improvidently granted with respect to a second order "as primarily implicating Pennsylvania law and presenting no federal question of substance."

Here, the Court disposed of this case in its entirety. As in *Cooper* v. *Aaron,* 358 U.S. 1, 17 (1958), this Court's judgments may not be ". . . nullified . . . indirectly through evasive schemes . . . whether attempted 'ingeniously or ingenuously'. *Smith* v. *Texas,* 311 U.S. 128, 132; 61 S.Ct. 164, 166; 85 L.Ed. 84."

Instead of any authority as reasoned argument, she concludes (Miller Op. to Mandamus, p. 15) on the note of "frauds and deceits upon clients", by which she means publication of opinion, since *no* security *or* transaction was ever identified, or "particularized" to involve fraud under state or federal law. The grant of certiorari herein was not limited. (See Pet. for cert., pp. 2-3.)

## II.

**Respondent Miller's Attempt to Bifurcate the General Verdict and This Court's Judgment Invites Consideration of the First Amendment Issue Already Granted in Our Petition for Certiorari.**

Chief Justice Hughes knew how to decide a free speech case as:

> ". . . comprehend[ing] every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938).

When he felt obliged to reach a constitutional issue, Chief Justice Hughes knew how to reach it. *Ashwander* v. *TVA,* 297 U.S. 298 (1936). Heresy is unconstitutional.

Since this case involves the conduct of jury trials in federal courts and appeals therefrom, few, if any, of the considerations mentioned by Justice Brandeis, concurring, in *Ashwander* (297 U.S. at 341) obtain.

No state or federal statute is now involved.

It is not a gratuitous undertaking for this Court in the present posture of this case to focus upon the trial of opinion herein.

Indeed, as the Court of Appeals judgment now stands, there has been the most flagrant violation of petitioner's First Amendment rights on a common law theory. No clearer case could be made for exercising this Court's supervisory jurisdiction than to require protection of this fundamental right, whether a trial is in the guise of common law or purportedly of a statutory claim.

After three decades of publishing, petitioner is not more amenable to being burned at the stake with common law faggots than with statutory oil. (See Pet. for Cert., pp. 11-16; see Petitioner's Reply Brief dated November 2, 1978, pp. 2-8.)

## CONCLUSION

The petition for writ of mandamus should be granted in accordance with its terms.

Respectfully submitted,

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Dated: September 9, 1980